

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BOSTON BLADE,

Defendant and Appellant.

B299424

(Los Angeles County
Super. Ct. No.NA095707)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Boston Blade was convicted of two counts of second degree robbery (Pen. Code, § 211; counts one and two)¹, and one count of second degree murder (§ 187, subd. (a); count three). As to counts one and two, the jury found that appellant was armed with a firearm during the robbery and the trial court imposed a firearm sentencing enhancement on each of those counts pursuant to section 12022.53, subdivisions (b) and (e)(1). In our prior opinion, *People v. Blade* (Nov. 30, 2018, B280956) (nonpub. opn.)(*Blade*), we reversed appellant's murder conviction for insufficiency of evidence.

We remanded the case to allow the trial court to exercise its discretion to strike or retain the remaining sentencing enhancements under section 12022.53, subdivision (h). On remand, the trial court struck the firearm enhancement on the robbery conviction in count two but retained the firearm enhancement on the robbery conviction in count one. Appellant was re-sentenced to 16 years.

In this appeal, appellant contends the trial court abused its discretion by refusing to strike the firearm enhancement on count one. Appellant further argues that the trial court failed to correctly calculate his presentence conduct credits earned before his original sentencing as well as his total actual credits before his re-sentencing. We find no abuse of discretion in appellant's sentencing. However, we agree with appellant regarding the errors in calculation of his credits. We therefore modify the judgment to reflect the correct credits calculation, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Trial and First Appeal

The underlying facts are discussed in detail in our prior unpublished opinion, *Blade, supra*, B280956. We summarize them here as relevant to the instant appeal.

At his trial, the prosecution presented evidence that appellant was a member of the Stxcccys, a subgroup of the Rollin' 20s Crip gang in Long Beach. The evidence supporting the murder charge included that on the evening of May 3, 2013, appellant was a passenger in a car with fellow

¹All further statutory references are to the Penal Code unless otherwise indicated.

Stxcccys members Marquis Wilson and Nicholas Rackley. When they encountered a rival gang member walking down the street, Rackley pulled the car over. Wilson got out of the car and fired multiple shots, killing the victim.² Appellant testified at trial that he was at the scene of the shooting, but was a passenger in another car, did not have a gun, and was “shocked” when Wilson shot the victim.

The robbery occurred two days later, around 11:30 p.m. Victims Bruce and Sy³ testified that they were working at a liquor store in Long Beach when appellant and Wilson entered the store carrying guns. At trial, Bruce testified that appellant came in, pointed his gun at Bruce and Sy, and told them to get on the floor; he threatened that if they did not get down and stay still, he would kill them. Bruce and Sy complied. Rackley entered the store, pulled Bruce off the floor and put a gun to his head. Rackley told Bruce to open the store register and demanded that he give them cash or they would kill him. Bruce complied. Appellant also took Bruce’s wallet. Bruce testified that the men took about \$1,000 from the register and also stole cigarettes and liquor from the store.

A jury found appellant guilty of second degree robbery in counts one and two (§ 211) and second degree murder in count three (§ 187, subd. (a)). As relevant here, on counts one and two the jury found true an enhancement allegation that appellant used a firearm within the meaning of sections 12022, subdivision (a)(1) and 12022.53, subdivisions (b) and (e).

The trial court sentenced appellant to five years in state prison on count one, plus ten years for the firearm enhancement, and one year on count two, plus three years and four months for the firearm enhancement. On count three, the trial court sentenced appellant to 40 years to life for second degree murder. In total, appellant was sentenced to 59 years and four months to life.

In our prior opinion, we reversed appellant’s murder conviction on count three for insufficiency of evidence. We remanded the case for the trial

²Rackley died in custody prior to trial. We affirmed Wilson’s conviction in our prior opinion. (See *Blade, supra*, B280956.)

³We refer to the victims by their first names to protect their privacy. (Cal. Rules of Court, Rule 8.90(b)(4).)

court to exercise its discretion to retain or strike the firearm enhancements on counts one and two pursuant to section 12022.53, subdivision (h) and section 1385.

Remand

During the re-sentencing hearing, appellant called several family members as character witnesses. His brother, mother, and aunt testified that appellant had matured since being incarcerated and was remorseful for his past conduct. Appellant's wife testified that appellant was "very involved" in prison, and that while in prison, "he's either at work or taking classes or in school." She believed appellant understood what he had done and "learned his lesson for the robbery he committed." All the witnesses testified that they were unaware of appellant's gang association at the time of the crime.

Appellant also testified, expressing his "deepest regrets" for taking a "firearm into the business establishment and unlawfully depriv[ing] five innocent people of their personal property." Appellant further testified about his job and efforts at self-improvement while in prison, including attending multiple groups and completing lengthy training classes. Appellant also introduced as evidence a series of seventeen documentations and certifications of completion from the D.E.F.Y. program, which he contended showed he was "ready to re-enter society and function as a law-abiding citizen." He admitted his prior gang membership, but denied threatening to kill anyone during the robbery.

During the re-sentencing hearing, defense counsel urged the court to strike both firearm enhancements. He reminded the court that "no victim was harmed" during the robbery and noted that at the time, appellant was only twenty-one years old and had only one prior misdemeanor conviction. Defense counsel also stressed appellant's progress while in prison, his newborn daughter (born while he was in prison), and argued that appellant was no longer "a threat to society." The prosecutor noted that, although appellant's murder conviction was overturned, he admitted being present when Wilson shot the victim. Moreover, appellant then committed a "very violent" armed robbery with the same fellow gang members two days later. Given the dangerous nature of the offense, appellant's gang affiliation, and

the fact that he was on probation for an earlier misdemeanor at the time, the prosecutor urged the court to retain the firearm enhancements on both counts.

The trial court indicated it had considered all of the evidence submitted. The court recognized “the positive conduct of Mr. Blade in state prison, combined with the fact that the offenses were committed at a youthful stage where there is a lack of maturity, where there’s a possibility of change.” The court also accepted appellant’s “statement of remorse . . . and his conduct in prison to the inference that positive change has occurred.” On the other hand, the court found “the [e]gregious violence shown at the time of the offense” weighed against striking the enhancements, in the interest of protecting the public. Based on these facts, the trial court concluded it was appropriate to retain the firearm enhancement as to count 1 and strike the enhancement as to count 2. Appellant was sentenced to 16 years.

At the time of re-sentencing, appellant had served a total of 2,088 days in custody, between his arrest on October 15, 2013 and his re-sentencing on July 3, 2019. However, the abstract of judgment reflected an award of only 1,233 days of actual credits, the time between appellant’s arrest and his original sentencing, and no conduct credits. Appellant’s counsel requested that the trial court recalculate appellant’s actual credits to reflect the additional 853 days appellant spent in custody since his original sentencing. The trial court refused, stating, “I don’t recalculate the credits. The state prison is doing that.” Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends the trial court abused its discretion in retaining the firearm enhancement on count one and in refusing to recalculate his total actual credits and applicable conduct credits. We affirm the judgment, with modifications to reflect the correct calculation of credits.

A. *Trial Court’s Discretion to Strike Enhancements*

Amended section 12022.53, subdivision (h), effective January 1, 2018, gives the trial court discretion “in the interest of justice pursuant to Section 1385 and at the time of sentencing, to strike or dismiss an enhancement otherwise required to be imposed by this section.” (*People v. Pearson* (2019) 38 Cal.App.5th 112, 116; see also §12022.53, subd. (h).) When determining

whether to strike a firearm enhancement under section 12022.53, subdivision (h), the trial court must consider the same factors it uses when handing down a sentence. (*People v. Pearson, supra*, 38 Cal.App.5th at p. 117.) “In addition to the factors expressly listed for determining whether to strike enhancements listed in California Rules of Court, rule 4.428(b), the trial court is also to consider the factors listed in California Rules of Court, rule 4.410 (listing general objectives in sentencing), as well as circumstances in aggravation and mitigation under . . . rules 4.421 and 4.423.” (*Ibid.*) The trial court is deemed to have considered these factors unless the record affirmatively reflects otherwise. (*Ibid.*) The court may consider factors such as “‘the crime involved great violence . . . threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness,’ that the ‘defendant was armed with or used a weapon at the time of the commission of the crime,’ and that the ‘victim was particularly vulnerable.’” (*Ibid.*, quoting Cal. Rules of Court, rule 4.421(a)(1)-(3).)

“A court’s discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is’ reviewable for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” (*Carmony*, at p. 377.) Therefore, “a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Ibid.*)

Here, following an evidentiary hearing and argument by counsel, the trial court struck the firearm enhancement as to count two but retained the enhancement as to count one. Appellant contends “[t]he trial court abused its discretion by not striking the 10 year firearm enhancement for count 1 considering appellant’s age of 21, his remorse, no one was physically injured,

his lack of significant prior record, and the fact he still has spent a significant period of time in custody.” However, the trial court expressly considered these factors and balanced them against the severity of the crime, appellant’s prior conviction, and the public’s interest in safety. In reaching its decision to strike the weapon enhancement as to count two and retaining it as to count one, the court recognized the “positive conduct” of the appellant in state prison. The court also gave weight to the fact that appellant committed the offenses at a young age when he lacked maturity. Additionally, the court acknowledged appellant’s remorse and recognized that a “positive change has occurred.” Appellant’s contention that the court should have weighed these factors more heavily does not establish an abuse of discretion.

The trial court made an informed discretionary sentencing decision after considering all pertinent factors. Nothing in the record establishes that the trial court failed to consider the relevant factors it was required to consider. We conclude that the refusal to strike the ten-year firearm enhancement on count one was not an abuse of the trial court's discretion.

B. *Credit Calculation For Time Served*

Appellant argues the trial court erred by refusing to recalculate the following credits: (1) his total actual credits, to reflect the additional time he spent in custody between his original sentencing and his re-sentencing; and (2) his conduct credits earned before his original sentencing. Respondent concedes the first error, but claims that the trial court did not need to recalculate appellant’s conduct credits.

“When the defendant ‘has been in custody’ ‘prior to sentencing,’ the trial court must calculate and award, in the abstract of judgment, all [such] days of custody . . .” (§ 2900.5, subds. (a) and (d).) When a sentence is modified on remand, “the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29 (*Buckhalter*).) “Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new

commitment for the same criminal act or acts.” (§ 2900.1; see also *Buckhalter, supra*, 26 Cal.4th at p. 32.)

The court imposing the sentencing must calculate “[t]he exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment.” (*Buckhalter, supra*, 26 Cal.4th at p. 30, quoting § 2900.5, subd. (d); see also § 2900.5, subd. (a); *People v. Arevalo* (2018) 20 Cal.App.5th 821, 829; *People v. Acosta* (1996) 48 Cal.App.4th 411, 423–424.)

Here, the original abstract of judgment reflected only the credits for the time appellant served in custody prior to his original sentencing. We agree with both parties that having modified appellant’s sentence on remand, the trial court was obliged to credit appellant with all actual days he spent in custody. Thus, the trial court’s refusal to recalculate appellant’s credits for time served was in error. The abstract of judgment must be modified to credit appellant with 2,088 days for actual time served.

Moreover, the trial court should have calculated the presentence conduct credits appellant earned. At his original sentencing appellant was not eligible for any good conduct credits because he was convicted of murder.⁴ However, appellant’s murder conviction has since been reversed and he is now entitled to conduct credits earned prior to his original sentencing. (§ 4019; see also *People v. Cooper* (2002) 27 Cal.4th 38, 40 “[d]efendants detained in a county jail” awaiting sentencing “[m]ay also be eligible for presentence good behavior/worktime credits” under section 4019[.]”) Those conduct credits are limited to a maximum of 15 percent of actual time served, because appellant was convicted of a violent felony under section 667.5. (§§ 2933.1, 4019.) Thus, appellant is entitled to conduct credits of 15 percent of the 1,219 days he spent in custody before his original sentencing, totaling 183 days.

Respondent does not dispute this calculation, but argues that the trial court did not need to recalculate the conduct credits because appellant did not earn any *additional* credits after his original sentencing. This misses the

⁴Section 2933.2(a) provides: “Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933.”

point. The trial court did not calculate appellant's presentence conduct credits at his original sentencing hearing because he was not eligible for them at the time of the original sentencing. He was, however, eligible at the time of his re-sentencing. The trial court's failure to conduct that calculation was in error.

DISPOSITION

The judgment is modified to reflect 2,088 days of actual custody credits, plus 183 days of conduct credits, for a total of 2,271 days of credits. The judgment is affirmed in all other respects. The trial court is directed to amend the abstract of judgment accordingly and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.